Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

(4)

No. 95-887

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. WAYMER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY FOR PETITIONER

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

6 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-887

ROBERT W. WAYMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY FOR PETITIONER

---

1. Respondent does not dispute that the "honest services" provision codified at 18 U.S.C. § 1346 — which defines mail and wire fraud to include schemes to deprive others of "the intangible right of honest services" — may fail to give clear warning of its application to many commonplace activities of state and local officials. *See* Brief for the United States in Opposition ("Resp. Br.") at 6-7. Nor does respondent dispute that the vagueness of this statute may present a significant question in an appropriate case.

Respondent merely contends that this is not an appropriate case on its facts. According to respondent, whether or not Section 1346 provides adequate warning to other public officials in other circumstances of what conduct may be deemed to deprive the public of its "intangible right of honest services," the statute

"provide[d] clear warning [to petitioner] that his own conduct was proscribed." Resp. Br. at 7.

The undisputed facts of the case — and simple logic — refute respondent's argument. Petitioner truthfully disclosed to Dr. Woodrow Wilson, the associate superintendent of schools, all of the following information, in writing: (i) that petitioner was engaged in business with companies that had contracts with the school district; (ii) the names of the companies and their principal; and (iii) that he had served as a sales representative and consultant to those companies since 1986. Pet. App. 2a. In response, Dr. Wilson informed petitioner, in writing, that this private business relationship would not constitute a "conflict" with his school board position so long as (i) "the company goes through the seal [sic] bid process," (ii) petitioner did "not initiate any business for [his] client with the school system," and (iii) petitioner did not vote on any matter involving the business. Trial Ex. F; *see* Pet. App. 2a-3a. Petitioner complied with all of these conditions. At no time did Dr. Wilson, or any other representative of the school district, seek any additional information from petitioner. No evidence exists that petitioner would not have provided additional information had he simply been asked.

Yet, despite the substantial disclosures that petitioner made to the school district and the unequivocal assurances that petitioner received from the school district, respondent asserts that petitioner had "clear warning" that he should have done more. The only source of this supposed warning was the vague and amorphous language of Section 1346: that petitioner should not defraud the citizens of Atlanta of their "intangible right" to his "honest services."

That is not enough. A public official like petitioner who identifies the business in which he has an interest, who discloses everything about that interest that he is asked to disclose, and who refrains from acting on any matter involving the business receives no fair notice from Section 1346 that he also must disclose the precise nature and extent of his interest. Clearly, this case

provides the Court with an appropriate vehicle in which to consider the vagueness of Section 1346.

2. Respondent erroneously suggests that petitioner is challenging Section 1346 based only on its application to "hypothetical situations." Resp. Br. at 6. In fact, petitioner is attacking Section 1346 as applied to his own situation. It is, of course, entirely appropriate for a petition for certiorari to inform the Court that review is warranted because of "the actual, practical effect of the disputed decision — its consequences for other litigants and in other situations." Speech of Chief Justice Vinson before the American Bar Ass'n (Sept. 7, 1949) (quoted in Robert L. Stern et al., *Supreme Court Practice* 354 (7th ed. 1993)).

3. Respondent cannot explain away the conflict between the decision below and the Eighth Circuit's decisions in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), and *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976).

In *Rabbitt*, in concluding that the majority leader of the Missouri House of Representatives did not deprive the citizens of Missouri of their right to his honest services by accepting commissions to recommend an architectural firm for state contracts, the Eighth Circuit relied on three factors: (i) that "Rabbitt did not, in his official capacity, control the awarding of state contracts to architects"; (ii) that Rabbitt did not "fail[] to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of [the architectural firm]"; and (iii) that the government had failed to identify any "standard of conduct applicable to legislators which clearly required disclosure of Rabbitt's interest in the [architectural] contracts." 583 F.2d at 1026. All of these factors are equally satisfied here.

First, petitioner "did not, in his official capacity, control the awarding of [school district] contracts to [pest control services]." As the record demonstrates, at least during the period when petitioner had an interest in the Peatross company, pest control contracts were awarded and renewed at the administrative level, without being submitted to the school board for approval. To be

sure, petitioner, together with the other members of the school board, had some ultimate responsibility for the school district fisc. But Rabbitt had precisely the same sort of responsibility for the state fisc. That alone did not, in the Eighth Circuit's view, constitute "control" over the awarding of a contract.

Second, petitioner did not "fail[] to carry out the duties and responsibilities of his [school board] office . . . for the sake of [the pest control firm]." It is undisputed that petitioner did not vote on any matter involving Peatross or otherwise attempt to exercise the authority of his office on behalf of Peatross. Respondent nonetheless suggests that petitioner had an obligation to inform the school district of "information suggesting the existence of substantial overpayments to a public contractor" (*i.e.*, that he was receiving payments for doing little work). Resp. Br. at 9. But no such obligation was recognized in *Rabbitt* in strikingly similar circumstances. *See* 583 F.2d at 1021 (noting that Rabbitt received $22,538 for recommending architectural firm for three state projects; much of the money was paid in the form of a "retainer" to Rabbitt's law firm, which "did little work for the retainer"). Nowhere did the Eighth Circuit suggest that Rabbitt's "duties and responsibilities" as a state legislator included giving the state information suggesting that the architectural firm was being overpaid because its fees included commissions to Rabbitt.

Finally, respondent has failed to identify any "standard of conduct applicable to [school board members] which clearly required disclosure of [petitioner's] interest in the [pest control] contracts." The only standard that respondent relies on is the vague language of Section 1346 itself.[1]

---

[1] Similarly, in declining to find a violation of the "honest services" doctrine in *McNeive*, the Eighth Circuit relied on the facts that the defendant plumbing inspector who accepted gratuities from a contractor "was not derelict in any of his affirmative duties" and did not "attempt to actively conceal" his receipt of the gratuities. 536 F.2d at 1252. As noted in the text, respondent has not suggested that petitioner was

It is thus clear that, contrary to respondent's assertions, petitioner could not have been convicted of mail fraud under the Eighth Circuit approach as articulated in *Rabbitt* and *McNeive*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHANIE E. PARKER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
3500 One Peachtree Center
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioner

March 11, 1996

---

derelict in his affirmative duties as a member of the school board, as opposed to his supposedly implicit duty to provide more detail about his business arrangement with Peatross. Nor is this a case of active concealment. There is no evidence that petitioner would not have disclosed all of that detail, and more, to the school district had he simply been asked.